IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JUSTIN DAVID SCHAFFER — APPELLANT

VS. — NO. 2009-KA-015

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JUSTIN DAVID SCHAFFER **APPELLANT**
A/K/A JUSTIN DAVID SHAFFER

vs. **CAUSE No. 2009-KA-00151-COA**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Greene County, Mississippi in which the Appellant was convicted and sentenced for his felony of **EXPLOITATION OF A CHILD**.

STATEMENT OF FACTS

The Appellant, no stranger to the courts of criminal justice[1], does not challenge the sufficiency or weight of the evidence concerning his latest criminal escapade, except as to one point, which will be discussed at length below. That being so, it is unnecessary to set out in detail the facts of his guilt. It is sufficient to say that the evidence clearly and overwhelmingly showed that the Appellant entered into telephonic and computer conversations with a person he

[1] *Shaffer v. State*, 2007-M-00356; *Shaffer v. State*, 740 So.2d 273 (Miss. 1998).

believed to be a girl of thirteen years and in due course traveled from his home in Greene County to Byram to meet her and enter into a sexual relationship with her. That the Appellant did so is beyond doubt – indeed, he apologized for his actions in this regard during allocution.

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR IN ITS INTERPRETATION OF MISS. CODE ANN. SECTION 97-5-33?

2. DID THE TRIAL COURT ERR IN ADMITTING INTO EVIDENCE THE "CHAT LOGS"?

3. WAS THE APPELLANT'S RIGHT OF CONFRONTATION VIOLATED BECAUSE PERSONS RESPONSIBLE FOR THE "PROXY SERVER" WERE NOT CALLED TO TESTIFY?

4. DID THE JUDGE OF THE CIRCUIT COURT WHO TRIED THE INSTANT CASE ERR IN FAILING TO RECUSE HERSELF?

5. DID THE TRIAL COURT ERR IN SENTENCING?

SUMMARY OF ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN ITS INTERPRETATION OF MISS. CODE ANN. SECTION 97-5-33 (Rev. 2006)

2. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING "CHAT LOGS"

3. THAT THE THIRD ASSIGNMENT OF ERROR IS NOT BEFORE THE COURT

4. THAT THE ISSUE EMBRACED BY THE FOURTH ASSIGNMENT OF ERROR HAS BEEN PREVIOUSLY DECIDED BY THE MISSISSIPPI SUPREME COURT AND THAT THAT COURT'S DECISION IS *RES JUDICATA* OR LAW OF THE CASE HERE

5. THAT THE TRIAL COURT DID NOT ERR IN NOT SENTENCING THE APPELLANT UNDER MISS. CODE ANN. SECTION 97-5-27(3) (REV. 2006)

ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN ITS INTERPRETATION OF MISS. CODE ANN. SECTION 97-5-33 (Rev. 2006)

In the First Assignment of Error, the Appellant claims that the trial court erred in its

interpretation of Miss. Code Ann. Section 97-5-33(6), (8) (Rev. 2006), in that the court held that it was not necessary that the State prove that the Appellant enticed an "actual" thirteen year girl.

The factual underpinning for the claim lies in the fact that, unbeknownst to the Appellant at the time he was communicating by computer and telephone with "Chloe," the people he contacted by computer and by telephone were adult women. The Appellant never spoke with a thirteen-year-old girl, and there was no "Chloe." In the Appellant's motion for a directed verdict, he urged this point as a ground for a directed verdict. He asserted that inasmuch as there was no child involved, he could not be convicted of exploitation of a child. After extensive argument, the trial court denied relief on the motion for a directed verdict. (R. Vol. 3, pp. 179 - 190).

While not very clearly set out, the Appellant appears to have at least two issues, perhaps interrelated, involved in the First Assignment of Error. The first issue is whether an "actual child" must be shown to have been involved in a prosecution under Miss. Code Ann. Section 97-5-33(6), or whether it is sufficient for the State to show that the accused enticed a person he believed to be a child, as permitted under Section 97-5-33(8). The other issue is whether there is a difference under Section 97-5-33(6) where the charge is attempted exploitation of a child, rather than a completed offense under that section, in terms of whether there is a requirement for an "actual child." Complicating the matter further, there is potentially the issue of whether a 2007 amendment to Section 97-5-33(8) applies in the case at bar.

Miss. Code Ann. Section 97-5-33(6) (Rev. 2006), the subsection under which the Appellant was charged, provides:

> No person shall, by any means including computer, knowingly entice, persuade, seduce, solicit, advise, coerce, or order a child to meet with the defendant or any other person for the purpose of engaging is sexually explicit conduct.

"Sexually explicit conduct" is defined at Miss. Code Ann. Section 97-5-31(b) (Rev. 2006). It is not said here that the Appellant's intentions were not to engage in "sexually explicit conduct" with "Chloe." A "child," for purposes of Section 97-5-31(6) is a person who has not attained the age of eighteen years. Miss. Code Ann. Section 97-5-31(a) (Rev. 2006).

MISS. CODE ANN. SECTION 97-5-33(8)

Section 97-5-33(8), as it existed in June - July 2006, the time in which the Appellant committed the acts forming the felony for which he has been convicted in the case at bar, provided:

> The fact that an undercover operative or law enforcement officer was involved in the detection and investigation of an offense under this section shall not constitute a defense to a prosecution under this section.

This subsection was amended in 2007 to provide:

> The fact that an undercover operative or law enforcement officer posed as a child or was involved in any other manner in the detection and investigation of an offense under this section shall not constitute a defense to a prosecution under this section.

The Appellant contends, firstly, that Section 97-5-33(6) clearly refers to an actual child and, secondly, that nothing in the version of 97-5-33(8), as that statute existed in 2006, can be reasonably thought to have altered Section 97-5-33(6). It is asserted that the trial court effectively applied the 2007 amendment of Section 97-5-33(8) in the case at bar, allegedly in violation of the constitutional proscriptions against ex post facto laws. Stated another way, the claim is that because the Appellant never spoke with an actual child of thirteen years, with a view toward engaging in sexually explicit conduct with her, he could not have been found guilty of violating Section 97-5-33(6). Thus, a directed verdict should have been granted. We have found

no decisions from this Court or the Mississippi Supreme Court which address this issue.

To the extent that the Appellant claims that the trial court applied the 2007 amendment to Section 97-5-33(8), we do not find that the trial court did so. It is true that the prosecution mentioned the amendment, stating that the 2007 amendment was but a clarification of pre-existing legislative intention, (R. Vol. 3, pg. 183), but the trial court, while it did deny relief on the Appellant's motion, did not state that the amendment was the reason for that denial (R. Vol. 3, pg. 190). This being so, so much of the Appellant's argument here based upon ex post facto considerations is unsupported by the record. Furthermore, the Appellant did not assert a potential ex post facto issue in the course of the argument below. He may not raise it now. *Rogers v. State*, 928 So.2d 831 (Miss. 2006).

The Appellant asserts that Section 97-5-33(8), as it existed at the time the Appellant committed the felony at bar, cannot be read so as to exclude what believes to be the necessity of the existence of an actual child for purposes of Section 97-5-33(6). In an effort to support this argument, he invokes rules of statutory construction, claiming that the Section 97-5-33(8) is ambiguous. In support of his claim that the subsection is ambiguous, he points out the 2007 amendment. According to the Appellant, Section 97-5-33(8) was intended only to apply to cases of child pornography. (Brief for the Appellant, at 12).

We do not find that Section 97-5-33(8), as its text existed at the time of the offense at bar, was ambiguous, nor do we find any support for the notion that it was intended to apply only to cases involving child pornography.

First of all, Section 97-5-33(8) clearly refers to "an offense under this section" and to "a prosecution under this section." There is no limitation whatever to offenses involving child pornography; the plain reading of the statute evinces a clear intention by the legislature that the

fact that undercover operatives or law enforcement officers were involved in the detection and investigation of any offense set out by Section 97-5-33 shall not constitute a defense to an offense defined by Section 97-5-33.

It is true enough that Section 97-5-33(6) uses the word "child." Certainly an act under this subsection against an "actual child" would be an offense, but subsection is not necessarily limited to an "actual child." Subsections six and eight must be read together. If the Appellant were right in his contention, then law enforcement would be put to using children as undercover operatives in the course of detecting and investigating crimes of this kind. Given the obvious potential dangers to children in using them in such a manner, this could not have been the intention of the legislature.[2]

---

[2] In *State v. Coonrod*, 652 N.W.2d 715 (Minn. App. 2002), the Minnesota court had before it an appellant who had used a computer to solicit sex from a person he thought was a fourteen year old girl, but who in fact was an adult police officer. That appellant was caught in a "sting" operation, as was the Appellant in the case at bar. In addressing a very similar if not the same claim raised here, court pointed out the folly of requiring "actual" children in such case, analogizing the case to other kinds of "sting operations. The Minnesota court stated:

> Jaime14" was not a corporation or other legal entity. But like those entities, she was not a flesh-and-blood human being either. Coonrod points to no language in the statute, or in the case law, that excludes a fictional persona such as "Jaime14" from the definition of a "person," or a "specific person." This court cannot supply language that the legislature has purposefully omitted or overlooked. *In re Rapp,* 621 N.W.2d 781, 786 (Minn.App.2001). The courts will not infer that the legislature intended an absurd result. *State v. Murphy*, 545 N.W.2d 909, 916 (Minn.1996). A few examples will illustrate the point. "Sting," or "undercover," or "decoy" operations are not uncommon. [footnote omitted] When a drug dealer has drugs to sell and is "sucked" into an undercover operation, the second he hands over the drugs to an undercover agent in exchange for money, the badge and handcuffs come out, and two things will happen: (a) he will not get to keep the money, and (b) he will not be able to argue that he can be guilty at most of mere possession rather than possession with the intent to sell, or a completed sale, because he had no chance to execute a bona fide sale. Exactly the same is true with undercover operations aimed at arresting prostitutes or their "johns." *Law enforcement would be in a high state of consternation if real prostitutes and real*

On the other hand, perhaps the Appellant means to be understood to say that law enforcement officers may only stand idly by while pedophiles contact children, only able to investigate if and when a complaint is made to them. If so, this construction is equally absurd. If that were the case, then why indeed would the legislature have troubled itself to draft Section 97-5-33(8): Law enforcement has the ability to investigate complaints of criminal misconduct generally and does not require a specific authorization to investigate crimes defined in Section 97-5-33.

This Court will not adopt unreasonable or absurd constructions of statutes. *Eason v. State*, 994 So.2d 785 (Miss. Ct. App. 2008). We think the subsections are unambiguous and that the Appellant's constructions of them would impute an unwise purpose or no purpose at all to Subsection eight.

However, should the Court find that an ambiguity exists between subsections six and eight of Section 97-5-33, then, in construing those subsections, the Court is required to ascertain the intent of the legislature by examining the words used, the subject matter, the historical background, and the purposes and objects to be accomplished. The Court is to determine the legislative intention, and, once that intention is found, the Court is to liberally construe the statues with a view toward effecting that intent. *32 Pit Bulldogs and Other Property v. County of Prentiss*, 808 So.2d 971 (Miss. 2002).

> *johns had to be used and if the possibility of a full successful completion of the transaction had to be present! Coonrod's argument, followed to its logical extreme, would demand that the state, when investigating the type of crime he is charged with, employ actual young girls to type the chat room text, to meet with the suspect, and to follow through with everything needed to get the suspect to the point of an overt act. We simply will not read that into the law.* (emphasis added)
>
> This Court should arrive at the same result.

Subsection eight clearly applies to any offense defined in Section 97-5-33. There is absolutely no warrant to find that the subsection was meant to apply only in cases of child pornography. Subsection eight clearly refers to "undercover operative[s]" as well as law enforcement officers involved in the detection and investigation of an offense under Section 97-5-33, and there is no limitation as to what detection and investigation may include. An adult undercover operative, posing as a child, would be involved in detecting an offense. In view of the evident purpose of Section 97-5-33, which is to prohibit and punish the exploitation of children, and in view of the duty of this Court to give effect to the entire statute, in accordance with the legislative intent, subsection eight authorizes an adult operative or law enforcement officer to represent themselves as a child, for purpose of Subsection six. To say otherwise would be to deprive Subsection eight of the full scope of what the legislature intended. The 2007 amendment to Subsection eight did not enlarge this, but only made the legislative intention all the more explicit.

Section 97-5-33(8), as it existed at the time of the Appellant's acts, did not explicitly state that the fact that an officer posing as a child would not constitute a defense, yet this was clearly the legislative intention. Otherwise, the statute would have no meaning. The 2007 amendment simply clarified this intention; it did not substantively change the statute. The use of undercover agents in detecting crime is hardly an unusual tactic by law enforcement Subsection eight, at the time of the commission of the offense at bar, clearly stated that the involvement of undercover operatives and law enforcement officers under Subsection six would not constitute a defense, and there was no limitation as to the extent of their involvement.

As we have said, it does not appear that the trial court applied the 2007 amendment in the case at bar, that court evidently being quite content to summarily deny the motion for a directed

verdict. Nor is an ex post facto issue before the Court on account of the Appellant's failure to raise any such issue. However, were the issue before the Court, we do not think the trial court would have erred in applying the amendment.

An ex post facto law is one that: (1) punishes an act previously committed, where the act when committed was innocent; (2) increases the punishment for a crime, after the crime was committed; or (3) deprives one of a defense which was available at the time the crime was committed. *Bell v. State*, 726 So.2d 93 (Miss. 1998). The 2007 amendment did nothing more than to make explicit what was implicit in the statute prior to its amendment. That an undercover operative could pose as a child was certainly implicit in Subsection eight prior to the amendment. The amendment did not create a punish an act that was innocent at the time it was committed, did not increase punishment, and did not destroy a defense.

WHETHER THE LACK OF AN "ACTUAL CHILD" WORKED A FAILURE OF EVIDENCE

We come now to the question of whether the use of an adult undercover agent, posing as a child, works a failure of proof on account of the fact that there is no "actual" child involved. Before discussing those decisions, though, it ought to be borne in mind that the Appellant's defense, essentially, was that it was impossible for him to violate Section 97-5-33 because at no time was he actually communicating with a child, only a person thought by him to be a child. While it does not appear that the Courts of this State have discussed the defense of impossibility at any length, the defense has been recognized in the State. *Duke v. State*, 340 So.2d 727 (Miss. 1976).

In *United States v. Farner*, 251 F.3rd 510 (5th. Cir. 2001), cited by the prosecutor at trial, the facts were substantially the same as those in the case at bar. The appellant in that case enticed a person he believed to be a girl of fourteen by computer and telephonic communications.

Unknown to him was the fact that the person with whom he had been communicating was not in actual fact a fourteen-year-old girl but was a federal bureau of investigation agent. That appellant and the agent agreed upon a time and place to meet; when that appellant arrived he was confronted by law enforcement officers.

That appellant was indicted under 18 U.S.C. Section 2422(b). That statute made it a federal criminal offense to knowingly entice, induce, persuade or coerce a person under the age of eighteen years to engage in prostitution or any sexual activity for which any person could be charged with a criminal offense, by use of the mail or any facility or means of interstate or foreign commerce. That appellant asserted that he could not be guilty of the offense because he at no time was in fact in contact with a minor, the FBI agent being an adult.

The Fifth Circuit, noting that that appellant's argument was one of factual impossibility, rather than legal impossibility, rejected the argument. It held as follows:

> On appeal, Farner claims that the district court should have granted his motion for judgment of acquittal because it was legally impossible for him to have committed the crime since the "minor" involved in this case was actually an adult. We review de novo a court's denial of a motion for judgment of acquittal. *See United States v. Castaneda-Cantu*, 20 F.3d 1325, 1330 (5th Cir.1994).
>
> Relying on *United States v. Contreras*, 950 F.2d 232, 237 (5th Cir.1991), cert. denied, 504 U.S. 941, 112 S.Ct. 2276, 119 L.Ed.2d 202 (1992), the district court held that "factual impossibility is not a defense if the crime could have been committed had the attendant circumstances been as the actor believed them to be." The court found beyond a reasonable doubt that Farner believed Cindy to be a minor and acted on that belief. On appeal, Farner insists that his defense was not factual impossibility, but rather legal impossibility.
>
> The distinction between factual and legal impossibility is elusive at best. *See, e.g., United States v. Everett,* 700 F.2d 900, 905 (3rd Cir.1983) (stating that the doctrine has become a "source of utter frustration" and a "morass of confusion"). Most federal courts have

repudiated the distinction or have at least openly questioned its usefulness. *See Osborn v. United States*, 385 U.S. 323, 333, 87 S.Ct. 429, 434, 17 L.Ed.2d 394 (1966) (questioning whether "the doctrine of 'impossibility' with all its subtleties" should have continued validity); *United States v. Powell*, 1 F.Supp.2d 1419, 1421 (N.D.Ala.1998), aff'd, 177 F.3d 982 ("In the Eleventh Circuit ... traditional factual impossibility/legal impossibility analysis has been discarded"); *United States v. Darnell*, 545 F.2d 595, 597 (8th Cir.1976) ("[B]eyond the logical problem is the pragmatic: the difficulty of categorization [of the two impossibilities]. The tidy dichotomy of the theoretician becomes obscure in the courtroom"); *United States v. Duran*, 884 F.Supp. 577, 580 n. 5 (D.D.C.1995), aff'd, 96 F.3d 1495 (D.C.Cir.1996) ("[C]ategorizing a case as involving legal versus factual impossibility is difficult, if not pointless"); *United States v. Quijada*, 588 F.2d 1253, 1255 (9th Cir.1978) (rejecting impossibility defense).

The illusory distinction between the two defenses is evident in the instant case. Thus, Farner says this is a case of legal impossibility because Kathy Crawford was an adult, and the statute does not address attempted sexual activity between adults. On the other hand, the district court viewed the impossibility as factual, because the defendant unquestionably intended to engage in the conduct proscribed by law but failed only because of circumstances unknown to him. We think the latter view is correct.

In any event, this circuit has properly eschewed the semantical thicket of the impossibility defense in criminal attempt cases and has instead required proof of two elements: first, that the defendant acted with the kind of culpability otherwise required for the commission of the underlying substantive offense, and, second, that the defendant had engaged in conduct which constitutes a substantial step toward commission of the crime. The substantial step must be conduct which strongly corroborates the firmness of defendant's criminal attempt. *United States v. Mandujano*, 499 F.2d 370, 376 (5th Cir.1974); *United States v. Oviedo*, 525 F.2d 881, 885-86 (5th Cir.1976); *United States v. Contreras*, supra. The Model Penal Code endorses this approach. See Model Penal Code § 5.01 (1985). In this case, the district court correctly concluded from the stipulated evidence, beyond a reasonable doubt, that Farner intended to engage in sexual acts with a 14-year-old girl and that he took substantial steps toward committing the crime.

We need not hold that there can never be a case of true legal impossibility, although such a case would be rare. [footnote

> omitted] The typical definition of that defense is a situation "when the actions which the defendant performs or sets in motion, even if fully carried out as he desires, would not constitute a crime." *United States v. Oviedo*, 525 F.2d at 883 (emphasis added). The one case cited by Farner which arguably invokes that doctrine is *United States v. McInnis*, 601 F.2d 1319 (5th Cir.1979). The defendants there were charged with, among other things, conspiracy to violate the federal kidnapping statute, 18 U.S.C. § 1201. The intended scheme of the alleged co-conspirators was to entice the victim to travel into Mexico on his own volition so that he could be kidnaped in Mexico. The co-conspirators "planned neither to cross state or international borders themselves nor to follow the abduction of (the victim) with international travel." Id. at 1326. This court concluded that even if the scheme had been implemented exactly as planned, it did not violate the federal kidnapping statute. [footnote omitted] The situation in the instant case is quite different. Defendant Farner's scheme, if fully carried out as he "desired" or "planned," was not to engage in sexual relations with an adult FBI officer. By his own stipulation, the person whom he desired to entice was a 14-year-old girl. The only reason he failed was because the true facts were not as he believed them to be.

Farner, at 512 - 513.

Recently, the United States District Court for the Northern District of Mississippi utilized this same analysis in denying federal habeas relief on a conviction under 18 U.S.C. Section 2425, a statute that is also similar to Miss. Code Ann. Section 97-5-33. *Fuqua v. United States*, 2009 WL 2854893 (N.D. Miss.).

In *United States v. Hubbard*, 480 F.3rd 341 (5th Cir. 2007), the Fifth Circuit stated the rule quite succinctly. In *Hubbard*, the facts were that that defendant was convicted of a federal offense involving child pornography. He had been previously convicted in Oklahoma of an offense similar to that in the case at bar. However, the District Court found that since there was no child involved in the Oklahoma case, the Oklahoma conviction was not one involving a minor, for purposes of federal sentencing enhancement. In reversing the District Court, the Fifth

Circuit stated:

> When a statute criminalizes conduct because the victim or intended victim is a minor, we have held that it is of no moment that the person with whom a defendant attempted to engage in prohibited conduct was actually an adult as long as the defendant believed the intended victim to be a minor and there is proof of two elements. [footnote omitted] Those are that (1) "the defendant acted with the kind of culpability otherwise required for the commission of the underlying substantive offense" and (2) "the defendant had engaged in conduct which constitutes a substantial step toward commission of the crime. The substantial step must be conduct which strongly corroborates the firmness of defendant's criminal attempt." [footnote omitted] In *United States v. Farner*, the defendant was convicted under 18 U.S.C. § 2422(b) for attempting to persuade and entice a minor to engage in criminal sexual activity. [footnote omitted] For three months, Farner communicated over the internet and by telephone with "Cindy," a person he believed to be a 14-year-old girl. [footnote omitted] He made arrangements with "Cindy" to meet her to engage in sexual activity. [footnote omitted] We held, based on evidence of acts he took to pursue this intent, that Farner had violated 18 U.S.C. § 2422(b), [footnote omitted] even though "Cindy" was an adult FBI agent. [footnote omitted] Other circuit courts of appeals have similarly reached the conclusion that federal statutes criminalizing conduct aimed at minors does not require the intended victim to be an actual minor when the requisite intent is present. [footnote omitted. The decisions cited in the footnote were: *United States v. Helder*, 452 F.3d 751, 756 (8th Cir.2006); *United States v. Tykarsky*, 446 F.3d 458, 461 (3d Cir.2006)]

Hubbard, at 346.

The Appellant suggests that the use adult undercover officers may be sufficient in attempted exploitation cases, but insufficient in completed exploitation crimes. It is true that some instances, including the *Farner* decision cited by the prosecutor in the trial below, involved prosecutions for attempted exploitation. However, Section 97-5-33(6) differs from federal or other State's statutes. We submit that, regardless of what may be said about the statutes of other jurisdictions vis a vis any distinction between attempted exploitation and completed exploitation

and the sufficiency of an adult undercover agent, Mississippi's statute is structured in such a way that any such distinction would not be relevant.

The elements of Section 97-5-33(6) are: (1) The use of a computer or other means; (2) to knowingly entice . . .; (3) a child; (4) to meet with the defendant or any other person; (5) for the purpose of engaging in sexually explicit conduct. The State is not required to show that any actual physical contact with a child occurred subsequent to the enticement, or that any "sexually explicit conduct" so occurred. On the other hand, if sexually explicit contact did occur subsequent to enticement, then that contact would comprise a separate and independent offense. Section 97-5-33(6) makes it an offense to commit certain actions with the purpose of meeting a child for the purpose of engaging in sexually explicit conduct. Whether an accused under that section is successful in his purpose or not is irrelevant; it is the fact that he undertook certain actions to do so that is the key. Other statutes, such as 18 U.S.C. Section 2422(b), set up a distinction between an attempt and a completed act, though the penalty to be imposed be the same. Our statute does not make that distinction: it is the fact of engaging in certain acts for the purpose of meeting a child for sexually explicit conduct that is condemned, regardless of whether the accused was successful in meeting the child for sexually explicit conduct.

In addition to this, since Section 97-5-33(8) provides that it is no defense that an undercover agent was involved in detecting a violation of Section 97-5-33(6), whatever distinction there may have been, if any, in the federal cases cited here and in the state cases cited by the Appellant between instances in which an undercover agent was involved as opposed to an "actual child" become insignificant.

So seen, it is not important whether there was ever an "actual child" involved. It was sufficient to show that the Appellant "the defendant acted with the kind of culpability otherwise

required for the commission of the underlying substantive offense" and (2) "the defendant had engaged in conduct which constitutes a substantial step toward commission of the crime. The substantial step must be conduct which strongly corroborates the firmness of defendant's criminal attempt." *Hubbard, supra.* The Appellant knowingly enticed or induced a person he believed to be a thirteen-year-old girl to meet with him for the purpose of engaging in sexually explicit conduct. Having done so, he violated Section 97-5-33(6). That the Appellant did not actually consummate his purpose is neither here nor there. That an adult operative was posing as "Chloe" was no defense and was no basis for find that the State failed in its burden of proof.

THAT IN THE EVENT THAT THIS COURT CONCLUDES THAT THE STATE'S EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR THE OFFENSE CHARGED, IT SHOULD AFFIRM THE CONVICTION AS AN ATTEMPT TO COMMIT CHILD EXPLOITATION

In the event, however, that this Honorable Court should conclude that the Appellant's actions constituted at most an attempt under Miss. Code Ann. Section 97-1-7 (Rev. 2006), then the Court should affirm a conviction therefor and remand for re - sentencing under the "direct remand" rule. *Shields v. State*, 722 So.2d 584 (Miss. 1998). Attempt to commit a crime is necessarily included in a charge of the commission of a crime. Miss. Code Ann. Section 99-19-5(1) (Rev. 2007).

The State's evidence clearly established the Appellant's acts of contacting "Chloe," established his purpose for doing so, and showed that the Appellant drove to Jackson to meet "Chloe." The Appellant was equipped with condoms. Should the Court conclude that the State's evidence failed to show that the Appellant actually met a thirteen-year-old girl, and that that failure was fatal to the conviction, the State's proof overwhelmingly showed that the Appellant attempted to do so and that he was frustrated in his attempt by a fact beyond his knowledge and

control.

The First Assignment of Error should be denied.

2. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING "CHAT LOGS"

In the Second Assignment of Error, the Appellant, most tediously we might say, complains that "chat logs" were improperly authenticated. In this, we are treated to a discussion of "proxies" and all manner of computer and internet lore, a topic recondite indeed for us.

Deanna Doolittle, better known to the Appellant as "Chloe," testified at length as to her training as a "contributor," testified at length about "chat rooms" and generally about the arcana of the cyberworld. (R. Vol. 2, pp. 74 - 83). She also testified about her part in the sting operation that netted the Appellant, and how it was set up. This included testimony about her screen name as "Orlandoluvsme.2" (R. Vol. 2, pp. 84 - 86). There was then some exceedingly tedious testimony about "profiles" and "screen shots," all of which she created. (R. Vol. 2, 87 - 92).

After all these preparations, or whatever they may have been, were made, Doolittle went "trolling" in "chat rooms" on "Yahoo" and remained there until she was contacted. In due course one "Cowboy39461" contacted her. Later the creature using that identity contacted her *sub nom* "Girth_i". Doolittle made "screen shots" of these things. There was then more interminable testimony about internet usage and computerese. Testimony and "screen shots" of "Girth_i" were admitted without objection. (R. Vol. 2, pp. 93 - 105).

In due course, Doolittle began "chatting" with "Cowboy39461." These were recorded. According to Doolittle, the "chats" – "chats" being apparently typed messages sent by computer and internet -- could be preserved in three ways. They could be archived by "Yahoo"; they could be saved on the hard disk of her computer; or by "proxy." According to Doolittle, this "proxy"

was located in Mississippi and was the preferred way of recording preserving the "chats" because it noted the time of the messages and because its data could not be altered. She then explained the technical aspects of connecting with the "proxy." She further testified that she was "on the proxy" before the "Cowboy39461's first contact with her and that she was required to be "on the proxy" every single time she "trolled." (R. Vol. 2, pp. 105 - 107).

The prosecutor handed the witness State's Exhibit 10, which was a record of the "chats" between Doolittle and "Cowboy39461." She stated that she had had the opportunity to read the document. She stated that she had not only read the document but "perused" it. She testified that the document was a true and accurate copy of the chats she had had with "Cowboy39461." The defense objected on the ground that a proper predicate had not been laid; it had previously objected to the "proxy" record because Doolittle had not been shown to be a record keeper for the "proxy." Both objections were overruled and the document was entered into evidence. (R. Vol. 2, 108 - 109). On cross - examination, the witness was asked whether she was present with the record of the chats was printed from the "proxy." She replied that she had her own copy of the chats. (R. Vol. 2, pg. 126).

The Appellant appears to complain that the State failed to present a witness to testify concerning accuracy of the printout of Exhibit 10 from the proxy computer, and that there was no evidence to show that the contents of Exhibit 10 accurately reflected the content of the "chats" between the Appellant and "Chloe."

Doolittle's testimony was surely sufficient. While there does not appear to be any decisions in this State on the particular point, in at least one other State testimony such as that produced here was found to be sufficient. *State v. Webster*, 955 A.2nd 240 (Me. 2008). Doolittle stated that she had perused the contents of Exhibit 10 and that Exhibit 10 was a correct

transcription of the "chats." Since it was Doolittle who was a participant in the chats, it seems to us that she was the witness to authenticate the accuracy of Exhibit 10. If there was a person who actually entered the command to the proxy computer to print the contents of Exhibit 10, that individual would not likely have been able to say whether Exhibit 10 was complete and accurate, that person not having been a party to the chats. If on the other hand the proxy computer for some reason failed to pick up some part of the "chats," a person not a party to the "chats" would not be able to know that. While the Appellant complains that whoever printed the print - out from the proxy computer was not presented to testify, in our view Doolittle's testimony was completely sufficient to authenticate the exhibit. She was a participant in the "chats," had perused (not merely flipped through) Exhibit 10, and was the best witness possible for the State to authenticate the exhibit.

The Appellant then launches into mere speculation that there might have been other men chatting with other members of Perverted Justice, that those conversations might have been stored on the same proxy computer, and that some how or another those might have compromised Exhibit 10. The Court should treat all that for what it is, which is all speculation. There is nothing whatever to give color to the Appellant's suppositions. In light of Doolittle's sworn testimony, it means nothing. Again, Doolittle testified that Exhibit 10 was an accurate transcription of the chats. This was sufficient.

The Appellant then complains that there were no transcripts of conversations between "Girth_i" and Doolittle. It is not clear to what extent there were "chats," or whether the "chats" contained anything of use for the State or the defense. If there were, though, and the Appellant thought they were in some wise helpful, he could have introduced them himself. The "chats" between "Cowboy39461" and Doolittle were complete. Those "chats" amply demonstrated the

Appellant's purpose; there was no reason to gild that lilly with "chats" with "Girth_i".

Despite the fact that Doolittle was the person with whom the Appellant was chatting, despite the fact that she testified that she had perused the exhibit and testified on first - hand, personal knowledge that the exhibit was accurate and complete, the Appellant attempts to say that her testimony was insufficient to authenticate the exhibit. This is an unreasonable position. All that was necessary was for the State to demonstrate that Exhibit 10 was what the State claimed it to be. The testimony of a witness with first - hand knowledge, such as Doolittle, is sufficient for that purpose. M.R.E. 901(a), (b)(1). If some other person printed or downloaded the chats between Doolittle and "Cowboy39461," all that person could have testified to was that what was downloaded or printed was what was in the proxy computer. Clearly, Doolittle's testimony was the most reliable and accurate testimony available to authenticate the exhibit. The trial court did not abuse its discretion in admitting Exhibit 10.

The Second Assignment of Error is without merit.

3. THAT THE THIRD ASSIGNMENT OF ERROR IS NOT BEFORE THE COURT

In the Third Assignment of Error, the Appellant claims that his right to confront witnesses against him was violated because the chat logs were not properly authenticated. This is so, says he, because no evidence was presented as to the ". . . integrity of the proxy and the methodology by which the relevant chats were filtered from the other chats relating to other cases that were stored on the proxy." (Brief for the Appellant, at 25).

There was no objection on this ground at trial, the only objection being that the chat logs were not properly authenticated. (R. Vol. 2, pg. 108). Since there was no objection on the basis of an alleged violation of the Confrontation clause, it may not be alleged here. *Mingo v. State*, 944 So.2d 18, 28 (Miss. 2006); *Young v. State*, 987 So.2d 1074, 1077 (Miss. Ct. App. 2008).

Even if the Third Assignment of Error were before the Court, there is no merit in it. The Appellant was afforded the right to confront Doolittle, and he utilized that right. It may be that the State did not call any person, if there was a person, who downloaded or printed the chat log, but in not calling such a person that meant there was nothing for the Appellant to confront. The notion that there was testimony against the Appellant by a person who did not testify is fanciful at best. The Appellant has not provided authority to support that flight of fancy.

There is no basis to consider *Crawford v. Washington*, 541 U.S. 36 (2004) here in view of the fact that there was no hearsay testimony concerning the integrity and so forth of the proxy computer. The State properly and sufficiently authenticated the chat logs through the witness Doolittle. The Appellant was permitted to cross - examine Doolittle. Doolittle did not give hearsay testimony concerning the integrity of the proxy computer.

The Third Assignment of Error is without merit.

4. THAT THE ISSUE EMBRACED BY THE FOURTH ASSIGNMENT OF ERROR HAS BEEN PREVIOUSLY DECIDED BY THE MISSISSIPPI SUPREME COURT AND THAT THAT COURT'S DECISION IS *RES JUDICATA* OR LAW OF THE CASE HERE

In the Fourth Assignment of Error, the Appellant alleges that the judge of the Circuit Court who tried the instant case should have recused herself. It is said that she presided in the trial of the Appellant upon charges of murder and rape. The Appellant was convicted of those felonies but the Mississippi Supreme Court reversed those convictions in *Shaffer v. State*, 740 So.2d 273 (Miss. 1998). It is claimed that the Circuit Court judge disagreed with the view of the prosecution that those charges could not be retried. That, according to the Appellant, demonstrated bias on the part of the judge.

Prior to trial, the Appellant moved to recuse the Circuit Court judge on the ground that the judge had allegedly made prejudicial comments about the Appellant after his murder

conviction had been reversed. (R. Vol. 2, pp. 6 - 12). The judge denied relief on that motion, and the Appellant raised this issue before the Mississippi Supreme Court in *Shaffer v. State*, 2007-M-00356. On 3 October 2007, the Supreme Court denied relief on the Appellant's petition for recusal of the Circuit Court judge. The doctrine of *res judicata* or of law of the case apply here as to the recusal issue. *Thorson v. State*, 895 So.2d 85, 117 (Miss. 2004).

Furthermore, we note that the Appellant never renewed his motion for recusal or moved anew for recusal. Since there was not a motion for recusal made at any time after the Supreme Court's decision, the Appellant may not be heard to complain that the trial court judge did not recuse herself. *Tubwell v. Grant*, 760 So.2d 687 (Miss. 2000).

Given the foregoing reasons why the Fourth Assignment of Error is not before the Court, it is unnecessary to address the Appellant's complaints in any detail. As for the attempt to renew the point made previously concerning the judge's alleged comments about the murder case involving the Appellant, the Supreme Court has addressed that. We do not think it necessary to chew the cabbage twice on that point.

Insofar as the Appellant would attempt to show bias on the part of the trial judge on account of the fact that she admitted the "chat logs," it was not error for the trial judge to have done so. Even if error was involved in that admission, there is nothing to show that the judge's ruling was prompted by bias against the Appellant.

As for the comments made during sentencing, those were in response to the Appellant's comments or were merely observations about the Appellant's statements to "Chloe." There was no objection made to them by the Appellant, and he may not be heard now to claim that those statements evinced prejudice against him. *Gatlin v. State*, 724 So.2d 359 (Miss. 1998). There is nothing to show that the Appellant's sentence was the product of malice or bias. One would

elements of two statutes. The indictment did not specify which statute the State intended to rely upon, and indeed it was the view of the Court that the State simply charged or attempted to charge both statutes. Since it was unclear, which of the two statutes had been violated, the Court remanded for sentencing under the one containing the lesser punishment.

In the case at a bar, it is as clear as it can be that the prosecution was brought for a violation of Section 97-5-33(6). The language of count one uses the language of that subsection; the indictment specifically sets out that subsection. It is very clear that the prosecution was not brought under Miss. Code Ann. Section 97-5-27(3) (Repealed, Miss. Laws, 2009, Ch. 369, section 1).

The Appellant, though, would have the Court seize upon a statement made in *Grillis* to the effect that, where a criminal offense may fall under two statutes, sentencing will be had under the one with the lesser punishment. The Court did say that in *Grillis*, but the Appellant has wrenched that statement out of context. *Grillis* most assuredly does not stand for the proposition that an accused may decide what he will be prosecuted for and how he will be sentenced if convicted.

It is rule of law that provides that it is a matter of prosecutorial discretion as to which statute to proceed upon where an accused's actions may constitute a violation of more than one statute. *E.g. Wilson v. State*, 904 So.2d 987 (Miss. 2004). So long as the prosecutor's decision as to which statute to proceed upon is supported by probable cause, it is his decision to make. In the case at bar, there is no question whatever about which statute was chosen by the prosecution, in sharp contrast to *Grillis*. The Appellant had no right to be sentenced under Section 97-5-27.

The Appellant also cites *Johnson v. State*, 260 So.2d 436 (Miss. 1972). In that decision, the Court found that possession of LSD was by statute both a misdemeanor and a felony at the

time of that appellant's conviction, with no distinctions. There is no such similar oversight by the legislature here. Section 97-5-33 has its own penalty provision under Miss. Code Ann. Section 97-5-35 (Rev. 2006). Assuming for argument that the Appellant might have been prosecuted under Section 97-5-27, that alleged fact is a matter of no consequence since the prosecutorial choice was very, very clear and since Section 97-5-33 has its own penalty provisions.

The Appellant also cites *Mayfield v. State*, 612 So.2d 1120 (Miss. 1992), though why he should do so is hardly obvious. That decision involved a construction (an erroneous construction, we might add) of Miss. Code Ann. 63-11-30, as that statute existed at the time of the decision. In the process of reaching its conclusion, the Court did mention *Grillis*. However, in the case at bar there is no ambiguity similar to that said to have existed in *Mayfield*. Again, the prosecutor's choice was clear. Whether the Appellant could have been charged under Section 97-5-27 is irrelevant.

The Appellant says that "computer luring" is lesser - included to exploitation. Since the Appellant did not request an instruction on what he describes as "computer luring," or take such a position at trial, this point is to be ignored here.

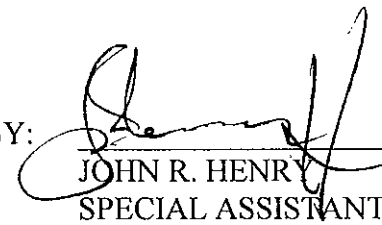
The Fifth Assignment of Error is without merit.

CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Kathy King Jackson
Circuit Court Judge
P. O. Box 998
Pascagoula, MS 39568-0998

Honorable Anthony Lawrence, III
District Attorney
400 Main Street, 1st Floor
Leakesville, MS 39451

E. Faye Peterson, Esquire
Attorney At Law
The Peterson Group, LLC
P. O. Box 16882
Jackson, MS 39206

This the 6th day of November, 2009.

JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680